82-785

Office - Supreme Court, U.S.
FILED
NOV 4 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

FORT BELKNAP INDIAN COMMUNITY, GROS VENTRE AND ASSINIBOINE TRIBES, A TRIBAL GOVERNMENT,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO THE SUPREME COURT OF THE UNITED STATES

Francis X. Lamebull, Esq.
Attorney for Petitioner
P. O. Box 38
Harlem, Montana 59526
(406) 353-2391

Thomas E. Towe, Esq.
Attorney for Petitioner
2525 Sixth Avenue North
Billings, Montana 59101
(406) 248-7337

1. QUESTION PRESENTED

This case presents the question of whether there is jurisdiction in the Court of Claims for the Petitioner Indian Tribe's claim of the existence and breach by the Respondent Government of a fiduciary duty, for the breach of which the Government must respond in damages.

2. TABLE OF CONTENTS

		Page
1.	Question Presented	1
2.	Table of Contents	2
3.	Table of Authorities	4
	Cases	4
	Statutes	6
4.	Order Below	7
5.	Jurisdiction	7
6.	Statutes Involved	8
7.	Statement of the Case	8
8.	Reasons for Granting this Writ..	14
9.	Conclusion	40
10.	Appendix	A-1
	Order of August 6, 1982 In the United States Court of Claims ..	A-2
	Petition of Indian Tribe	A-11
	25 U.S.C. §81	A-38
	25 U.S.C. §160	A-40
	25 U.S.C. §174	A-41
	25 U.S.C. §185	A-42
	25 U.S.C. §331	A-43

25 U.S.C. §348 ..... A-45

25 U.S.C. §462 ..... A-49

25 U.S.C. §470 ..... A-50

25 U.S.C. §476 ..... A-51

25 U.S.C. §477 ..... A-53

28 U.S.C. §1491 ..... A-54

28 U.S.C. §1494 ..... A-56

28 U.S.C. §1505 ..... A-57

Order of October 16, 1978 in the United States Court of Claims A-58

3. TABLE OF AUTHORITIES

Cases

	Page
Aleut Community of St. Paul Island v. United States, 202 Ct. Cl. 182, 480 F.2d 831 (Ct. Cl. 1973)	34
Duarte v. United States, 532 F.2d 850 (2d Cir. 1976)	39
Duncan v. United States, Ct. Cl. ____, ____, 667 F.2d 36 (1981)	30,36
Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967)	19
Gros Ventre & Assiniboine Tribes of the Fort Belknap Indian Community, A Tribal Government v. United States (See Appendix)	11,32 34
Hatzlachh Supply Co. v. United States, 444 US 460 (1980)	39
Joint Tribal Council Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975)	34
Mason v. United States, 461 F.2d 1364, 1374 (Ct. Cl. 1972)	20
Mitchell II - Mitchell v. United States, 229 Ct. Cl. ____, ____, 664 F.2d 265, cert. granted, 50 USCW 3959 (June 8, 1982)	22,26 27,29 30,36
Montana Bank of Circle, N.A. v. United States, (Ct. Cl. No. 328-77, October 6, 1978) (See Appendix	8,9, 10,13 33

Cases, cont. Page

Navajo Tribe of Indians v. United States, 224 Ct. Cl. ____, ____, 624 F.2d 981, 987 (1980) 30,35

Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) 34

Squire v. Capocman, 351 US 1 (1856) 25

United States v. Anderson, 625 F.2d 910, 915 (9th Cir. 1980), cert. den. 450 U.S. 920 101 S. Ct. 1367, 67 LEd.2d, 347 (1981) 35,36

United States v. Clarke, 445 US 253 (1980) 24,25

United States v. Constantine, (1935) 296 US 287, 80 LEd. 233, 56 SCT 223 15

United States v. Duncan, No. 85-1747, 667 F.2d 36 16

United States v. Mitchell, No. 81-1748, 664 F.2d 265 (1981) 16

United States v. Mitchell, 445 US 535, 100 S. Ct. 1349, 63 LEd.2d 607 (1980) 18,21 22,24 25

Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979) Rev'd. 445 US 535 (1980) 21

United States v. New York Rayon Importing Co., 329 US 654,660 (1947).. 39

United States v. Testan, 424 US 392, 398 (1976) 17,18 19,39

Statutes	Page
25 U.S.C. §81	17,31 32,34 36
25 U.S.C. §331	22
28 U.S.C. §1491	17-22 26,38
28 U.S.C. §1505	17,22 38
28 U.S.C. §1525	26

4. ORDER BELOW

The Order of the Court of Claims is currently unreported, but it is printed in the Appendix herein, infra., page A-2. A related case, The Montana Bank of Circle, N.A. vs. The United States, is unreported. (Court of Claims, No. 328-77, October 16, 1978.)

5. JURISDICTION

The jurisdiction of this Court is invoked under the Judicial Code, 27 United States Code, Section 1255(1):

> "§1255. Court of Claims; certiorari; certified questions.
>
> Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted on petition of the United States or the claimant; ... ."

The Order of the United States Court of Claims (Appendix, infra., page A-2)

sought to be reviewed was entered on August 6, 1982.

6. STATUTES INVOLVED

The case involves the following statutes, each set out in the Appendix hereto, infra., beginning at page A-38: 25 U.S.C. §§81, 470, 476 and 477; 28 U.S.C. §§1491, 1494, and 1505.

7. STATEMENT OF THE CASE

The facts material to the consideration of the question presented are as follows. The facts alleged are from the allegations of the petition of Petitioner Indian Community, the Order of the Court of Claims upon which this petition calls in question and the Order of the related case, Montana Bank of Circle, N.A. vs. United States, (Court of Claims, No. 328-77, October 16, 1978), which arises out of the same transactions and events as involved here.

Petitioner, Fort Belknap Indian Community (or Fort Belknap Reservation) is comprised of the Gros Ventre and Assiniboine Indians and the Community's wholly owned corporation, Fort Belknap Builders. Montana Bank of Circle, N.A. vs. United States, op. cit., at page 1, Appendix, infra., at A-58.

In the early 1970's, the Fort Belknap Indian Community embarked on a program of economic development with the strong support of the Bureau of Indian Affairs. Montana Bank of Circle, N.A. vs. United States, op. cit., at pages 1-2, Appendix, infra., at A-58.

The Indians decided to construct a factory building and to enter into the homebuilding business. The Tribal Council established a for-profit corporation, Builders, owned wholly by the Tribe and incorporated under the laws of Montana. Management for Builders was to be pro-

vided by a separate, non-Indian corporation, Economic Consultants, Inc. Montana Bank of Circle, N.A. vs. United States, op. cit. at page 2, Appendix, infra., at A-58.

Financing for the factory project was obtained from the Montana Bank of Circle, N.A., after negotiation involving the BIA and the Indians, the Bank loaning the Tribe $350,000. Of this sum, $150,000 was to be used for the industrial complex and $200,000 by Builders as working capital. Additional funds were supplied by the BIA. Montana Bank of Circle, N.A. vs. United States, op. cit. at page 2, Appendix, infra., at A-58.

The Petitioner Indian Community has alleged that the United States assumed and undertook a relationship of personal confidence and trust with the Indian Community by virtue of Treaty and federal statute with regard to the land, property,

and well-being of Tribal members. Petition of Petitioner, The Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community, A Tribal Government vs. United States, Appendix herein, infra., Page A-11 through A-37, Counts Two, et. seq.

Petitioner claims that Respondent breached a fiduciary or trust duty in the following particulars in said petition in that:

1. The United States allowed the Indian Community to undertake the construction of houses and banking commitments without first investigating the people and their technical, managerial and financial capabilities who would be managing the construction project and who would be responsible for carrying out the commitments of the Indian Community and its wholly owned subsidiary, Fort Belknap Builders, Inc.

2. The United States failed to provide adequate assistance to the Indian Community during its negotiations with those managing as aforesaid, with the various banks, with the Fort Belknap Housing Authority, and with the Housing & Urban Development Department.

3. The United States failed to inform the Indian Community, the Fort Belknap Builders, Inc., creditors, and failed to take appropriate action such as advice and counsel and notification of impending legal actions when the Respondent learned of the jeopardy of the construction project and its management and the mismanagement of Fort Belknap Builders, Inc.

4. The United States committed fraud, misrepresentation, and unfair trade practices in its failure of disclosure of estimates of costs, impossibility of performance, approval of addi-

tional construction contracts, and assignments of housing construction contracts, failure to properly supervise and evaluate, and in otherwise acting or omitting to act as aforesaid in items 1 through 3 above.

5. The United States failed to make required contract payments and drafted specifications for contracts which were defective and impossible of performance.

The Indian Community claims monetary damages in the amount owed to the aforementioned Bank, plus interest, cost, and attorneys' fees.

In its Order of October 16, 1978, the Court of Claims in The Montana Bank of Circle, N.A. vs. The United States (Court of Claims No. 328-77), under identical legal and factual issues as to the Tribe, remanded to the Trial Judge the breach of fiduciary duty claims of the petitioner Bank noting that the case

in this area involved issues of first impression:

> "The two counts based on breach of fiduciary obligation present unique and factually complicated arguments involving several issues of first impression." (At page 3.)

As to the instant case, in its Order of August 6, 1982, under identical facts and legal issues as to the Tribe, the Court of Claims dismissed the Indian Community's petition for failure to state a claim within the jurisdiction.

8. REASONS FOR GRANTING THE WRIT

A. Conflict of Authority, Diverse Decisions, and Pending Cases

Rule 17.2 of the Rules of the United States Supreme Court provides that the same general considerations outlined in Rule 17.1 "will control in respect of petitions for writs of certiorari to review judgments" of the Court of Claims. Rule 17.2, USCS, Supreme Court Rules.

Rule 17.1 provides for consideration of a conflict in decisions as being a basis for review on certiorari as well as a decision which has decided an important question of federal law which has not been, but should be settled by this Court. Rule 17.1(a) and (c), USCS, Supreme Court Rules. And despite any absence of conflicting decisions, where there is a diversity of decisions at a court level and other cases pending in which action is awaiting authoritative settlement of the question presented by the petitioner for a writ of certiorari, a question is sufficiently important to invoke the jurisdiction of this Court. United States v. Constantine, (1935) 296 US 287, 80 LEd 233, 56 SCT 223. (Under predecessor to Rule 17.)

There are currently pending before this Court two cases upon which certiorari has been granted which have a bear-

ing on this case. United States v. Mitchell, No. 81-1748, 664 F.2d 265 (1981), and United States v. Duncan, No. 85-1747, 667 F.2d 36, cert. granted, 50 U.S.L.W. 3959 (June 8, 1982).

It is respectfully submitted that there is such a conflict of authority, a diversity of decisions, and pending cases in which action is awaiting authoritative settlement of the question presented here, that a writ of certiorari should be granted in the instant case.

Additionally, and apart from the above, the order to which this writ is directed has decided an important question of federal law which has not been, but should be settled by this Court.

B. Authority on the Question

(1) The Court of Claims Below

The Order of August 6, 1982 of the United States Court of Claims, relief from which this application is directed

towards, dismissed petitioner Tribe's claims as to damages for breach of a fiduciary relationship on the gound of lack of jurisdiction. Order, Appendix, infra., page A-2 through A-10.

The basis for the Court of Claims finding of no jurisdiction was that 25 U.S.C. 81, relied on by petitioner, cannot fairly be interpreted as mandating compensation by the federal government for the damage sustained, citing United States v. Testan, 424 US 392, 398 (1976). Order, page 3 thereof, Appendix, infra., pages A-5 and A-6.

Jurisdiction by the Court of Claims is based on 28 U.S.C. §1505, which confers upon the Court of Claims jurisdiction to entertain claims against the United States by Indian tribes to the same extent that claims would be cognizable in court if the claimants were not Indians, under the Tucker Act, 28 U.S.C.

§1491. United States v. Mitchell, (1980, US) 63 LEd2d 607, 100 SCT 1349.

The Tucker Act provides that: (in pertinent part)

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort ..."
>
> 28 U.S.C. §1491.

(2) The Limits of Testan

In 1976, in United States v. Testan, 424 US 392, 47 LEd.2d 114, 96 S. Ct. 948, the U. S. Supreme Court for the first time considered under what circumstances as Act of Congress gives rise to a claim for damages under the Tucker Act's "Founded ... upon ... any Act of Congress" language. This Court held that a statute other than the Tucker Act

creates a substantive right enforceable against the United States in money damages only if it "'can fairly be interpreted as mandating compensation the the federal government for the damages sustained'". Id., at 400, 47 LEd.2d 114, 96 SCT 948, quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967).

Testan, op. cit., thus stands for the proposition that when reliance is placed on the "Act of Congress" language of the Tucker Act (28 U.S.C. §1491), the jurisdictional question under the Tucker Act turns on a determination of whether the particular claim fits within any of the categories of another federal act, where the Act relied upon can be fairly interpreted as mandating compensation by the federal government for the damage sustained.

Unanswered by Testan, op. cit., was

whether reliance on the "or for liquidated or unliquidated damages in cases not sounding in tort" language of the Tucker Act (28 U.S.C. §1491) is sufficient to provide the creation of a substantive right enforceable against the United States for damages.

In Mason v. United States, 461 F.2d 1364, 1374 (Ct. Cl. 1972), rev'd on other grounds, 412 US 391 (1973), the Court of Claims indicated that claims for breach of trust would fall within this category of claims: (Emphasis supplied.)

> "A suit against the United States on behalf of the estate of a non-competent Indian, for damages for compensating the estate for breach by the Government of its trust obligations under a federal statute, is within 28 U.S.C. Section 1491 as a claim founded upon an Act of Congress and for damages 'in cases not sounding in tort.'"

The United States did not raise any jurisdictional issue in this Court.

The Court of Claims in Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979), Rev'd. 445 US 535 (1980), declined to consider the Tucker Act category of claims "for liquidated or unliquidated damages in cases not sounding in tort," as possibly covering the case before it, since there was specific legislation creating the trusteeship from which the claims arose. Id., at p. 1305.

Even after remand by United States v. Mitchell, 445 U.S. 535, 100 S. Ct. 1349, 63 LEd.2d 607 (1980), the Court of Claims again bypassed the issue:

> "Again we bypass (see our prior Mitchell opinion, 219 Ct. Cl. at _____, 591 F.2d at 1301-02), the phrase in 28 U.S.C. §1491 giving this Court jurisdiction over claims against the United States for 'liquidated or unliquidated damages in cases not sounding in tort.' Plaintiffs do not rely on that clause which has never been fully and authoritatively construed but rather on specific legislation as founding their

claims."

> Mitchell v. United States, 229 Ct. Cl. _____, 664 F.2d 265 (hereinafter Mitchell II), cert. granted, 50 USCW 3959 (June 8, 1982).

(3) The Limits of Mitchell

This Court, in United States v. Mitchell, 445 US 535, 100 S. Ct. 1349, 63 LEd.2d 607 (1980) held that: a. Under neither the Indian Claims Commission Act (28 U.S.C. §1505), giving the United States Court of Claims jurisdiction as to claims by Indian tribes founded upon the Constitution, federal laws, or treaties, nor under the Tucker Act (28 U.S.C. §1491) giving the Court of Claims jurisdiction as to any claim against the United States founded either upon the Constitution or any Act of Congress, is there a substantive right against the U.S. to recover money damages; b. The General Allotment Act (25 U.S.C. §331, et seq.) did not create any fiduciary

responsibility in the United States for management of forest lands.

Unanswered and expressly left open by the Court was the issue of whether a statute imposing on the Government general fiduciary duties toward the Indians would constitute a waiver of sovereign immunity:

> "We need not consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity. We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." Id., at p. 615.

Thus, Mitchell merely holds that the General Allotment Act doe not confer general fiduciary responsibilities, leaving open the possibility that some other act would, and if it did, sovereign

immunity would be waived.

Furthermore, Justice Marshall, in United States v. Mitchell (1980), 63 LEd.2d 607, 100 SCT 1349, commenced his examination of the General Allotment Act with the declaration that the Act "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." Id., at 615.

This requirement of an "unambiguous expression of congressional intent is a very strict standard of construction and at odds with two familiar canons of construction also adopted by this Court: The "plain meaning" rule and the rule that statutes intended to benefit Indians are to be liberally construed in the Indians' favor.

The former "plain meaning" canon formed the basis for this Court's decision in United States v. Clarke, 445 US

253 (1980), handed down less than one month before Mitchell, ibid., and involved an Indian allotment in Alaska. [One Hornbook specifically discusses the General Allotment Act as exemplary of the proposition that the United States may act as Trustee. A. Scott, Law of Trusts §95 (1967]. Under the "plain meaning" canon, the General Allotment Act clearly established a full fiduciary relationship.

The latter canon formed the basis of Squire v. Capocman, 351 US 1 (1856), a case involving allotments on the Quinault Reservation.

(4) The Limits of Mitchell II

In United States v. Mitchell, 445 US 535, op. cit., the Supreme Court reversed and remanded the prior decision of the Court of Claims to consider the plaintiffs' other grounds for asserting that the Government was liable in money damages for the alleged mismanagement.

445 US at 546, N.7, 100 S. Ct. at 1356, N.7.

Mitchell II, op. cit., held that, if a statute creates or recognizes the United States as general trustee of Indian property, that legislation ordinarily founds a substantive monetary claim for breach of that trust. This is a claim which may be vindicated by the Indian beneficiary through a suit for breach of that trust. It may be brought in the Court of Claims under 28 U.S.C. §1491 (and 28 U.S.C. §1525). Mitchell v. United States, 664 F.2d 265 (1981), certiorari granted.

(Continued on next page.)

Whether that proposition will be sustained by this Court is an open question and one which has a direct bearing on this case.

But the Court of Claims in Mitchell II, supra., made clear what the rest was in connection with the statutes there involved:

> "The common thread of the statutes we have just construed as contemplating compensation to the Indians is that they all (a) deal with Indian-owned property, (b) directed to be managed and controlled by federal officials as fiduciaries, (c) in the express interest of and for the benefit of the Indians, and (d) from which the Congress clearly wanted the Indians to obtain the financial benefits. In sum, this is a typical Indian trust relationship involving monetary

(Continued on next page.)

benefits to the beneficiary."

Id., at p. 273.

In its discussion of one of the statutes which expressly required funds to be paid for the benefit of the members of the tribe, the Court of Claims recognized that such provisions are not the criteria:

> "Congress had a longer reach. It created a fiduciary relationship through this statute and required that sales must be based upon a consideration of the needs and best interests of the Indian owners and his heirs. (citation). That was always the ultimate goal.
>
> ***
>
> To us, Congress has authorized the Indians to claim compensation for a breach of the trust Congress has itself fixed in order that the beneficiaries shall receive the benefits Congress plainly contemplated for them. A trust normally entails the right to compensation for the trustee's breach (G. Bogert, The Law of Trusts & Trustees §862 (2d ed.1965)); 3 A. Scott, The Law of Trusts §205 (3d ed. 1967), and this statute does not in any way

suggest otherwise."

Id., p. 271.

It is submitted, and will be shown, that the Court of Claims, bound by its own decision in Mitchell II, supra., failed in the instant case to properly apply it and that the result reached in this case is contradictory to the result reached in Mitchell II, supra.

(5) The Limits of Other Holdings of the Court of Claims

The Court of Claims has also held that "where the federal government takes on or has control of supervision over tribal monies or properties, the fiduciary relationship normally exists with regard to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or fundamental document) about a trust fund, or a trust or fiduciary connection."

Navajo Tribe of Indians vs. United States, 224 Ct. Cl. _____, _____, 624 F.2d 981, 987 (1980).

In a companion case to Mitchell II, supra., likewise before this Court on a petition for writ of certiorari, Duncan v. United States, Ct. Cl. _____, _____, 667 F.2d 36 (1981), the Court of Claims found that certain legislation involving Indian rancheria status authorized and mandated compensation for federal breaches of trust, and that the Court of Claims was the proper forum for claims arising from the breach of such trust.

The breach in that case primarily involved the failure of the United States to provide the Indians with a sufficient water system:

> "Chief among these [obligations left unfulfilled by the Government] was the directive ... to construct and improve (before termination) the sanitation and water facilities upon which the department

should agree with the Indians." Id., p. 43.

This was sufficient for the Court's conclusion that it could be fairly interpreted that the legislation mandated compensation for damages sustained.

Duncan, supra., is clearly contrary to the holding of the Court of Claims in the instant case.

(6) Pursuant to 25 U.S.C. §81, Congress has mandated and authorized compensation for federal breaches of trust, and the Court of Claims is the proper forum for petitioner

Petitioner relies in part upon 25 U.S.C. §81, which provides that no agreement shall be made by any person with any tribe "for the payment *** of money" unless "such contract or agreement be executed" and bears "the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it." 25 U.S.C. §81, Appendix, infra., at page

A-38.

As acknowledged by the Court of Claims in the instant case:

> "The statute was designed to protect Indians by subjecting their contracts to the prior examination and approval of the Secretary of the Interior and the Commissioner of Indian Affairs. [citation]." Order, Ct. Cl., at Appendix, infra., page A-8.

At issue, and disputed by the Court of Claims, is whether the Act created a fiduciary relationship.

The Court of Claims in the instant case found that the congressional intent to protect Indians found in 25 U.S.C. §81 was far short of the congressional intent required to create a fiduciary duty:

> "The statute now before us falls far short of imposing a fiduciary obligation upon the United States that would make the government liable for losses Indians may suffer as the result of their contracts with third parties that the government approved." (citation omitted). Order, at Appendix, infra., p. A-9.

However, in the case of Montana Bank of Circle, N.A. vs. The United States, Ct. Cl., No. 328-77, the order of that Court in a matter involving the identical factual matters before this Court, and with plaintiff in that case relying on identical statutes and a treaty, the government in its answer admitted the existence of a trust relationship with the tribe:

> "Plaintiff relies on both a treaty and on several statutes to establish defendant's fiduciary obligations to the Fort Belknap Indians, and defendant, in its answer, has admitted the existence of a trust relationship with the Tribe."
>
> Order, Appendix, at pages A-63 and A-64.

Apart from this admission, which this Court can take judicial notice of in this case, when the United States asserts its control over a particular sphere of activity -- here contract or agreement approval -- which affects a tribe, the

courts treat the action as creating a fiduciary relationship. Joint Tribal Council Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (federal government's consent required for all land transactions gave rise to a trust relationship with respect to land transactions); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (power in Secretary of Interior to license traders on Indian reservations created duty); Aleut Community of St. Paul Island vs. United States, 202 Ct. Cl. 182, 480 F.2d 831 (Ct. Cl. 1973) (legal obligation to protect subsistence hunting based on language in a treaty and two statutes which recognized the importance of subsistence hunting but did not declare its protection to be a legal obligation of the U.S.).

Here, the purpose found by the Court of Claims for 25 U.S.C. §81 was the protection of the Tribe. Order, at page A-8,

citing H.R. Rep. No. 2449, 85th Cong., 2nd Sess. 1, reprinted in 1958 U.S. Code Cong. & Admin. News 3961. It is submitted that such an expressed legislative intent is sufficient to provide the basis for the fiduciary relationship.

The contracts of the Tribe are of course "property". And when the government controls or has supervision of properties, unless Congress has provided otherwise, the fiduciary relationship normally exists with respect to such properties, even though nothing is said expressly in the statute about a trust or fiduciary connection. Navajo Tribe of Indians vs. United States, 224 Ct. Cl. _____, _____, 624 F.2d 981, 987 (1980).

Nothing in the Act relied upon by petitioner Tribe herein says or suggests that Congress wishes, contrary to historical principle, to depart from the norm of fiduciary duty. See: United

States vs. Anderson, 625 F.2d 910, 915 (9th Cir. 1980), cert. den., 450 U.S. 920, 101 S. Ct. 1367, 67 LEd.2d, 347 (1981).

To hold otherwise, as the Court of Claims did here, is to fly in the face of the holdings in Duncan v. United States, supra., and Mitchell II, supra., the test in the latter case being met here by petitioner: a. The statute deals with Indian-owned property -- contract rights; b. The entry into which is controlled by the government; c. in the interest of and for the benefits of the Indians, & d. from which contracts Congress clearly wanted the Indians to obtain the financial benefits. See: Mitchell v. United States, 664 F.2d 265 (1981), pet. cert. granted, supra.

The Court of Claims clearly should have concluded that 25 U.S.C. §81 clearly authorized and mandated compensation for federal breaches of trust. The substan-

tive claim for monetary compensation was created by the legislation, which formed and continued a general trust with the implied duties not to act or omit to act in the manner alleged by petitioner in its petition: Failure to thoroughly investigate controlling parties and their subcontractors; failure to assist in contract negotiations; failure to notify petitioner of jeopardy of project and its mismanagement, after determining the truth thereof; failure to disclose known impossibility of performance of contracts, the specifications of which were drafted by the government.

The above conclusion is the plain meaning of the statute, and a liberal construction -- required when the statute is intended to benefit Indians -- provides the same answer.

(7) Pursuant to the "damages" provision of the Tucker Act, the requisite jurisdiction

is provided.

Petitioner, through its jurisdictional claim under 28 U.S.C. §1505, which allows the Tribe to proceed under the Tucker Act, 28 U.S.C. §1491, petitioner has raised reliance on the alternative "for liquidated or unliquidated damages in cases not sounding in tort," as the basis not only for jurisdiction but also for the waiver of sovereign immunity which may be required to cause the government to respond in damages.

This approach concludes that the jurisdiction grant of the Tucker Act and the waiver of immunity are congruent.

To hold otherwise will be to bar all claims based on contracts and regulations of executive agencies, as an example. If this section of the Tucker Act is not a consent to suit, there is none, as no federal contracting officer or other official is empowered to consent to suit

against the United States. United States v. New York Rayon Importing Co., 329 US 654, 660 (1947).

Not even claims based on the U.S. Constitution can otherwise be brought against the U.S. unless petitioner's position is adopted, as reflected in Duarte v. United States, 532 F.2d 850 (2d Cir. 1976), in which the Court of Appeals for the second circuit, citing Testan, op. cit., held that a claim for damages for taking of property in violation of the due process clause of the Constitution was barred by the government's sovereign immunity, because that clause contained no specific grant of a cause of action.

This Court has perhaps suggested this approach in its reference to the "waiver of sovereign immunity contained in the Tucker Act" in Hatzlachh Supply Co. v. United States, 444 US 460 (1980), decided three months before Mitchell's,

op. cit., rejection of the waiver when just federal acts are relied upon.

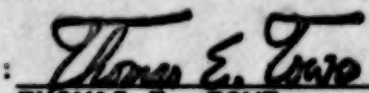
9. CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS E. TOWE
Counsel for Petitioner
2525 Sixth Avenue North
Billings, Montana 59101

FRANCIS X. LAMEBULL
Counsel for Petitioner
P. O. Box 38
Harlem, Montana 59526

By: 
THOMAS E. TOWE

IN THE UNITED STATES COURT OF CLAIMS

No. 500-BIL

FORT BELKNAP INDIAN COMMUNITY, GROS VENTRE AND ASSINIBOINE TRIBES A TRIBAL GOVERNMENT,	)	Indian claims; alleged breach of trust relationship; jurisdiction; alleged breach of lease.
v.	)	
THE UNITED STATES	)	

AUG 6 1982

Francis X. Lamebull, attorney of record, for plaintiff.

Craig A. Decker, with whom was Assistant Attorney General Carol E. Dinkins, for defendant.

Before FRIEDMAN, Chief Judge, DAVIS and NICHOLS, Judges.

ORDER

In this case an Indian tribe alleges that the United States breached a lease with the tribe and also violated its fiduciary duties to the tribe. The defendant has moved to dismiss the petition. We deny the motion with respect

to the claim of breach of the lease, but grant it with respect to the other claims.

In Count One of the petition, the plaintiff asserts that the Bureau of Indian Affairs in 1970 leased 10,000 square feet of temporary office space from the tribe for $12,000 per year, but that the Bureau breached its contract by failing to pay pursuant to the lease. The eight other counts of the petition allege that existence and breach by the Government of a trust relationship with the Fort Belknap Indian Community.

The essence of these eight counts is that the government allowed the plaintiff to enter into certain unfortunate business agreements with third parties, regarding a construction project on the Fort Belknap Indian Reservation; that as a result of those agreements, the Fort Belknap Indian Community and its wholly owned subsidiary, Fort Belknap Builders,

Inc., suffered financial losses and other damages; and that the government's failure to protect the Fort Belknap Indian Community from entering into the allegedly unconscionable agreements was a breach of the government's fiduciary obligations to the tribe, for which the tribe may recover damages.

1. The government concedes that Count One states a cause of action for breach of contract that is within our jurisdiction under 28 U.S.C. § 1491 (Supp. IV 1980) over contract claims against the United States. The Government argues, however, that our six-year statute of limitations bars this claim. See 28 U.S.C. § 2501 (1976). The agreement upon which the plaintiff bases this claim was executed in 1970 and the present suit was not filed until 1981. We are unwilling to dismiss this count, however, because the plaintiff may be able

to show that the government's alleged breach was a continuing one.

2. The government seeks dismissal of the plaintiff's remaining eight counts on the ground that in these counts the plaintiff has failed to state a claim within the jurisdiction of this court. We agree.

For us to have jurisdiction over such claims there must be an alleged violation of federal statutes that "confer a substantive right to recover money damages from the United States . . . ." United States v. Testan, 424 U.S. 392, 398 (1976). Moreover, a statute creates a substantive right to money damages only if it "'can be fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id. at 400, quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967). The juris-

dictional requirements enunciated in Testan apply equally to Indian claims. United States v. Mitchell, 445 U.S. 535 (1980). There the Supreme Court stated that tribal as well as individual claimants "must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims." Id. at 538.

In the present case the plaintiff contends that the government's alleged fiduciary duty stems from a statute. The issue before us, therefore, is whether plaintiff has alleged the existence of a substantive right to money damages based on a statute that mandates compensation. As we recently stated, "although 'the substantive right to money' need not be explicitly stated in the substantive legislation itself, . . . Congress's waiver of sovereign immunity with respect to money compensation must be clear or

strong before the court can say that the statute mandates compensation.'" Inupiat Community v. United States, Ct. Cl. No. 596-77 (decided June 2, 1982) (quoting Mitchell v. United States, 229 Ct. Cl. ___, 664 F.2d 265, 268-69 (1981) (Mitchell II), cert. granted, 50 U.S.L.W. 3959 (June 8, 1982)).

The plaintiff relies upon 25 U.S.C. § 81 (1976), which provides in part:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of serivces for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be

> in writing, and a duplicate of it delivered to each party.
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> . . .

This provision does not mandate the payment of money if the United States approves Indian contracts that prove to be unwise or improvident. The statute was designed to protect Indians by subjecting their contracts with third persons to the prior examination and approval of the Secretary of the Interior and the Commissioner of Indian Affairs. See H.R. Rep. No. 2449, 85th Cong., 2d See.1, reprinted in 1958 U.S. CODE CONG. & AD. NEWS 3961. However, a Congressional intent to protect Indians falls far short of the "clear or strong" (Inupiat, supra) Congressional intent required to create a fiduciary duty by the United States to oversee and manage a tribe's contractual relations, for the breach of which the

United States must respond in damages.

In Mitchell, the Supreme Court concluded that despite language in the General Allotment Act (25 U.S.C. § 348) that the United States is to hold allotted land "in trust for the sole use and benefit of the Indian," the Act "cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." Id. at 546. The statute now before us falls far short of imposing a fiduciary obligation upon the United States that would make the government liable for losses Indians may suffer as the result of their contracts with third parties that the government approved. Cf. Hydaburg Coop. Ass'n v. United States, 229 Ct. Cl. ____, 667 F.2d 64, 69 (1981). ("It is a far different matter, however, given the broad view of sovereign immunity we must take under Mitchell, supra, and its predeces-

sors, to conclude that Congress intended the United States to be liable as a fiduciary for the promotion, maintenance, and management of assets and enterprises acquired by the Indians pursuant to the Act.").

The defendant's motion to dismiss with respect to Count One is denied, and that count is remanded to the trial division for further proceedings. The defendant's motion to dismiss with respect to Counts Two through Nine is granted, and those counts are dismissed.

BY THE COURT

Daniel M. Friedman
Chief Judge

DRAFT

THE UNITED STATES COURT OF CLAIMS

THE GROS VENTRE AND ASSINIBOINE TRIBES OF THE FORT BELKNAP INDIAN COMMUNITY, A TRIBAL GOVERNMENT,	)	No. _____
Petitioner,	)	PETITION
-vs-	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	

COMES NOW the Petitioner and for its claim for relief against Respondent alleges as follows:

COUNT ONE

I.

That the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community are organized as Indian Tribes pursuant to the Indian Reorganization Act of 1934 (25 U.S.C. § 476) and function as a tribal government pursuant to said Act and

have the inherent sovereign powers of self-government.

II.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1491, 1494, and 1505.

III.

That on or about April 1, 1970, Fort Belknap Indian Community, a tribal government, entered into a loan agreement with Montana Bank of Circle, N. A., a national bank chartered by the federal government, for the purpose of borrowing $350,000.

IV.

That as a further inducement for Montana Bank of Circle, hereinafter Bank, to make aforesaid loan to Fort Belknap Indian Community, hereinafter Community, and its agency, Bureau of Indian Affairs, agreed to rent 10,000 square feet of temporary office space for $12,000 per annum,

subject to the terms and conditions set forth in that certain letter of February 2, 1970, a copy of which is attached as Exhibit "A" to the Loan Agreement attached to this Petition as Exhibit "A". That said Agreement was approved by the Acting Director whose signature appears on the same Agreement; that the Bureau of Indian Affairs has failed and neglected to pay the $12,000 per year or any other sum to Petitioner's damage in the amount of $72,000.

COUNT II

I.

That the Respondent, United States of America, has assumed and undertaken a relationship of personal confidence and trust with the Fort Belknap Indian Community by virtue of the various treaties and federal statutes with regard to the land, property, and well-being of the tribal members of the Fort Belknap Indian Community. That said relationship is

founded upon the Treaty of October 9, 1895, ratified by Congress by the Act of June 10, 1896 (29 Stat. 321, 350). In addition, Petitioner, the Fort Belknap Indian Community, relies on 25 U.S.C. §§ 331, 348, 174, 185, 81, 160; the Indian Reorganization Act of 1934 (48 Stat. 984); and other pertinent portions of Title 25 of the United States Code and on the Act of March 3, 1921, c. 135 Stat. 1355. Petitioner further relies on the Regulations set forth in Title 25 of the Code of Federal Regulations.

II.

That the Respondent, United States of America and its agent, the Secretary of Interior, the Commissioner of Indian Affairs, the Area Director of the Billings Area Office and the Superintendent of the Fort Belknap Reservation breached their fiduciary responsibility and trust relationship as follows:

(a) By allowing Fort Belknap Indian Community to undertake in 1970 and 1971 through a wholly owned subsidiary the construction of houses at Fort Belknap Agency and elsewhere and by allowing the Fort Belknap Indian Community to make certain commitments including the borrowing of $350,000 from the Montana Bank of Circle, N.A. without first investigating the persons and background of the people who would be managing the construction project and who would be responsible for carrying out the commitments of Fort Belknap Indian Community and it wholly owned subsidiary, Fort Belknap Builders, Inc.

(b) By failing to adequately investigate the technical, managerial, and financial capabilities of economic Consultants and Fairchild Pola International who purported to enter into management contracts and management responsibilities for the aforesaid project

for construction of certain homes on the Fort Belknap Indian Reservation.

(c) By failing to adequately investigate the reasons Economic Consultants and Fort Belknap Builders, Inc. had been refused financing by the First National Bank of Great Falls and the misgivings that were carried in connection with such loans. Had the Respondent and its agents fully investigated the background of the principals and other parties who were encouraging Fort Belknap Indian Community to enter into the obligations and transactions surrounding the construction of homes on the Fort Belknap Indian Reservation, no such commitments and obligations would have been incurred by Fort Belknap Indian Community.

(d) Failed to provide adequate assistance to Petitioner, Fort Belknap Indian Community, during its negotiations with Economic Consultants, Fairchild Pola

International, and various banks and creditors and with the Fort Belknap Housing Authority and with the Housing and Urban Development Department. In one particular, the management agreement between Fort Belknap Builders, Inc., Fort Belknap Indian Community's wholly owned subsidiary, and Economic Consultants, Inc. was manifestly unfair. The Respondent and its agents were involved in the negotiations of that agreement and should have reached a similar conclusion and advised said Fort Belknap Builders, Inc. or Fort Belknap Indian Community against entering into such an agreement.

(e) Respondent and its agents failed to take action when it became aware that the management of Fort Belknap Builders, Inc. was remiss in carrying out its responsibilities.

(f) That the Respondent and its agents failed to take action when Fort

Belknap Indian Community's wholly owned subsidiary, Fort Belknap Builders, Inc., ran into serious financial difficulties and in particular when Respondent and its agents learned during the summer of 1970 that there were financial difficulties and in 1971 when further difficulties developed and when the promotional activities of Mr. Steve Long first were brought to Respondent's attention.

(g) That Respondent and its agents failed to take action by informing the Petitioner and other creditors that Fort Belknap Builders, Inc. was in financial difficulty and that the management of Fort Belknap Builders, Inc. was remiss in carrying out its responsibilities and that the promotional activities of Steve Long were jeopardizing the activities and operation of the construction projects heretofore referred to.

(h) That the Respondent and its

agents failed to provide advice and counsel to the Petitioner, Fort Belknap Indian Community, and to Fort Belknap Builders, Inc. when the Fort Belknap Indian Community and Fort Belknap Builders, Inc. reached the height of its dilemma in connection with the construction projects heretofore referred to; that Respondent and its agents failed to advise Fort Belknap Indian Community and Fort Belknap Builders, Inc. of the possibility of legal action against Economic Consultants, Inc. and against Steve Long and other parties who had mismanaged the affairs of Fort Belknap Builders, Inc. and who had mismanaged the construction project and who had obtained funds improperly when such action became apparent, all to the detriment of Fort Belknap Indian Community and to Fort Belknap Builders, Inc.

III.

That as a result of the breach of fiduciary relationship and trust relationship as aforesaid, Fort Belknap Indian Community has been damaged in the amount of $303,363.44, plus interest from May 29, 1972, at the rate of 10% per annum, plus reasonable attorneys' fees, as the result of the obligation of Fort Belknap Indian Community on a promissory note to Montana National Bank of Circle, N.A.

IV.

That further Petitioner has been damaged in the amount of $453,392.50, plus interest at 10% per annum from January 1, 1972, plus reasonable attorneys' fees, which sum is the amount owed by Fort Belknap Builders, Inc. to Montana Bank of Circle, N. A. as a result of obligations and promissory notes entered into for the purpose of financing the aforesaid housing construction projects.

COUNT THREE

I.

Petitioner realleges those matters contained in Count Two.

II.

That Respondent and its agents, the Secretary of Housing and Urban Development, the Regional Administrator for Housing Assistance, Region VIII, are guilty of fraud, misrepresentation, unfair trade practices, and taking unfair and undo advantage, all in breach of the Respondent's fiduciary and trust responsibility and relationship in the following particulars:

(a) The Respondent and its agents failed to disclose to Fort Belknap Indian Community, its subsidiary, Fort Belknap Builders, Inc., and Steve Long, the manager of Fort Belknap Builders, Inc., the engineer's estimate of cost for the Montana 10-5 Project and the Montana

10-1 Project; that failure to reveal such estimate was willfully and purposefully done and resulted in Fort Belknap Indian Community and Fort Belknap Builders, Inc. entering into a contract which was impossible of performance and which resulted in Fort Belknap Indian Community and Fort Belknap Builders, Inc. entering into obligations and responsibilities which it could not possibly keep; that said engineers estimate of cost for these projects was substantially higher than the amounts bid by Steve Long on behalf of Fort Belknap Builders, Inc., the subsidiary of said Petitioner, Fort Belknap Indian Community.

(b) Respondent and its agents failed to adequately advise and counsel Fort Belknap Indian Community and Fort Belknap Builders, Inc. as to the possibility of successfully completing the Montana 10-5 Project and the Montana 10-1

Project for the price bid for such projects.

(c) That Respondent and its agents failed to investigate the technical, managerial, and financial capabilities of Fort Belknap Builders, Inc. and its management team -- Economic Consultants -- prior to approving the assignment of the housing construction contract (Montana 10-5) from C & M Construction Company to Fort Belknap Builders, Inc. Such an investigation undoubtedly would have revealed serious deficiencies in the capabilities of Fort Belknap Builders, Inc. and its management.

(d) That Respondent and its agents failed to adequately monitor the management of Fort Belknap Builders, Inc. in connection with the Montana 10-5 Project and the Montana 10-1 Project. Evaluations should have included overall management as well as the technical

aspects of the housing construction.

(e) That Respondent and its agents failed to adequately consider the Fort Belknap Builders, Inc. technical and managerial difficulties when approving an additional construction contract, namely, the Montana 10-1 contract. The difficulties of Fort Belknap Builders, Inc. were readily apparent when the second contract was approved. By that time, the local Housing Authority had voiced doubts about the capabilities of the Fort Belknap Builders, Inc. and its management.

(f) The Respondent and its agents continued to approve construction contracts on the Cheyenne River Indian Reservation in South Dakota with individuals who were responsible for the mismanagement of Fort Belknap Builders, Inc., even though the roles of the same individuals in Fort Belknap were well known.

The continuation of these negotiations caused Petitioner to place greater confidence in Steve Long and other individuals responsible for the mismanagement of Fort Belknap Builders, Inc.

III.

That Petitioner further bases its claim for relief on a violation of the mandate and requirements of the Federal Housing Act of 1949, 42 U.S.C. § 1441 et seq., as amended, and 42 U.S.C. § 1453 and the National Housing Act, 12 U.S.C. § 1701 et seq.

IV.

That as a result of the failures and improper actions of Respondent, Fort Belknap Builders, Inc. and Fort Belknap Indian Community have been damaged in the amount of $303,363.44, plus interest at 10% per annum from May 29, 1972, as the result of the obligation of Fort Belknap Indian Community on a promissory note to

Montana National Bank of Circle, N. A.

V.

That further, Petitioner has been damaged in the amount of $453,392.50, plus interest at 10% per annum from January 1, 1972, plus reasonable attorneys' fees, which sum is the amount owed by Fort Belknap Builders, Inc. to Montana Bank of Circle, N. A. as a result of obligations and promissory notes entered into for the purpose of financing the aforesaid housing construction projects.

COUNT FOUR

I.

That on or about November 25, 1969, the Fort Belknap Housing Authority entered into an agreement for the construction of 50 houses on the Reservation of Fort Belknap Indian Community, said contract was assigned to Fort Belknap Builders, Inc., and to secure certain loans, to Montana Bank of Circle. A copy of said

contract is attached hereto as Exhibit "C".

II.

That said contract of sale, referred to as the Montana 10-5 Project, called for the construction and sale to Respondent of 50 houses for $846,000 or approximately $16,920 apiece. In truth and in fact, such houses cost in excess of $26,100 to build under the specifications and requirements established by the Respondent; that in fact, the next project, the Montana 10-6 Project, called for construction of the exact same houses at $26,100 each.

III.

That the terms in the contract setting forth the sums for which the houses were to be constructed and sold to Respondent constituted a mutual mistake and the contract should be reformed and in equity and fairness, the sum should be increased

from $846,000 to $1,305,000 to reflect the full and true value of the houses constructed and actually received by Respondent. That the additional sum and amount constituted unforeseen costs, and the mutual mistake of the parties should be corrected.

IV.

Fort Belknap Builders, Inc. is entitled to receive the sum of $459,000 in excess costs by way of reformation of the aforesaid contract. Said claim has been assigned to Montana Bank of Circle by virtue of an assignment set forth as Exhibit "B" attached hereto.

COUNT FIVE

I.

Petitioner realleges all those matters contained in Count Four herein.

II.

That the Respondent drafted all of the specifications for compliance with

the contract known as Montana 10-5, and the contractor has faithfully executed his performance in accordance with those specifications.

III.

The specifications for compliance with the construction contract of sale known as Montana 10-5 were defective and impossible of performance within the amount of money allocated therefor, and the contractor is entitled to compensation for costs incurred by it in attempting to comply with the defective specifications as well as for additional costs resulting from the changes necessary to correct the said defects; that the Fort Belknap Builders, Inc. has been damaged by having paid the contractor for said sums in the amount of $459,000.

IV.

That Fort Belknap Builders, Inc. has assigned this claim and all other claims

to Montana Bank of Circle by virtue of an assignment, a copy of which is attached hereto as Exhibit "B".

COUNT SIX

I.

Petitioner realleges all those matters contained in Counts Four and Five herein.

II.

That because of the aforesaid defective specifications and requirements, the contractor incurred substantial delay which caused substantial increase in costs to contractor, all of which have been paid or suffered by Fort Belknap Builders, Inc.

III.

That the Respondent failed to make payments as required under the contract and as provided for under the terms of the 20 houses for $370,000 or approximately $18,500 apiece. In truth and in fact, such houses cost in excess of the

contract, and as provided for under the terms of the contract, such partial payments and progress payments being required by the contract to continue its operation and failure caused delays to the contractor, and said delays caused substantial overruns and additional costs to the contractor, all of which have been paid with funds provided by the Montana Bank of Circle.

IV.

The Fort Belknap Builders, Inc. has been damaged in the amount of $453,392.59, plus interest at 10% per annum from January 1, 1972, plus reasonable attorneys' fees, which sum is the amount owed by Fort Belknap Builders, Inc. to Montana Bank of Circle, N. A. and could not be repaid because of the aforesaid failure to make payments as required under the contract.

V.

That Fort Belknap Builders, Inc. has

assigned this claim and all other claims to Montana Bank of Circle by virtue of an assignment, a copy of which is attached hereto as Exhibit "B".

COUNT SEVEN

I.

That on or about the 9th day of September, 1971, the Fort Belknap Housing Authority entered into an agreement for the construction of 20 houses on the reservation of Fort Belknap Indian Community, said contract was assigned to Fort Belknap Builders, Inc., a subsidiary of Fort Belknap Indian Community, and to secure certain loans to Montana Bank of Circle. A copy of said contract is attached hereto as Exhibit "D".

II.

That said contract of sale, referred to as the Montana 10-1 Project, called for the construction and sale to Respondent of 20 houses for $370,000 or approxi-

mately $18,500 apiece. In truth and in fact, such houses cost in excess of $26,000 to build under the specifications and requirements established by the Respondent; that in fact, the next project, the Montana 10-6 Project, called for construction of the exact same houses at $26,100 each.

III.

That the terms in the contract setting forth the sums for which the houses were to be constructed and sold to Respondent constituted a mutual mistake and the contract should be reformed, and in equity and fairness, the sum should be increased from $370,000 to $522,000 to reflect the full and true value of the houses constructed and actually received by Respondent. That the additional sum and amount constituted unforeseen costs, and the mutual mistake of the parties should be corrected.

IV.

The Fort Belknap Builders, Inc. is entitled to receive the sum of $152,000 in excess costs by way of reformation of the aforesaid contract.

V.

That Fort Belknap Builders, Inc. has assigned this claim and all other claims to Montana Bank of Circle by virtue of an assignment, a copy of which is attached hereto as Exhibit "B".

COUNT EIGHT

I.

Petitioner realleges all those matters contained in Count Seven herein.

II.

That the Respondent drafted all of the specifications for compliance with the contract known as Montana 10-1, and the contractor has faithfully executed his performance in accordance with those specifications.

III.

The specifications for compliance with the construction contract of sale known as Montana 10-1 were defective and impossible of performance within the amount of money allocated therefor, and the contractor is entitled to compensation for costs incurred by it in attempting to comply with the defective specifications as well as for additional costs resulting from the changes necessary to correct the said defects; that the Fort Belknap Builders, Inc. has been damaged as a result of these defective specifications in the amount of $152,000.

IV.

That Fort Belknap Builders, Inc. has assigned this claim and all other claims to Montana Bank of Circle by virtue of an assignment, a copy of which is attached hereto as Exhibit "B".

WHEREFORE, Petitioner prays for

judgment against Respondent as follows:

1. For the sum of $72,000 as set forth in Count One herein.

2. For the sum of $303,360.44, plus interest from May 29, 1972 at the rate of 10% per annum, plus reasonable attorneys' fees, as set forth in Count Two herein.

3. For the sum of $303,360.44 plus interest from May 29, 1972 at the rate of 10% per annum, plus reasonable attorneys' fees; and for $453,392.59, plus interest from January 1, 1972 at the rate of 10% per annum, plus reasonable attorneys' fees, as set forth in Count Three herein.

4. For the sum of $459,000 as set forth in Count Four herein.

5. For the sum of $459,000 as set forth in Count Five herein.

6. For the sum of $453,392.59, plus interest from January 1, 1972 at the rate

of 10% per annum, plus reasonable attorneys' fees, as set forth in Count Six herein.

7. For $152,000 as set forth in Count Seven herein.

8. For the sum of $152,000 as set forth in Count Eight herein.

DATED this _____ day of _____.

§81. Contracts with Indian tribes or Indians

"No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose

for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

§160. Custody of stocks or bonds held in trust for tribes

"All stocks, bonds, or other securities or evidences of indebtedness now [on June 10, 1876] held by the Secretary of the Interior in trust for the benefit of certain Indian tribes shall, within thirty days from the passage of this act [June 10, 1876], be transferred to the Treasurer of the United States, who shall become the custodian thereof; and it shall be the duty of said Treasurer to collect all interest falling due on said bonds, stocks, &c., and deposit the same in the Treasury of the United States, and to issue certificates of deposit therefor, in favor of the Secretary of the Interior, as trustees for various Indian tribes. And the Treasurer of the United States shall also become the custodian of all bonds and stocks which may be purchased for the benefit of any Indian tribe or tribes after the transfer of funds herein authorized, and shall make all purchases and sales of bonds and stocks authorized by treaty-stipulations or by acts of Congress when requested so to do by the Secretary of the Interior: Provided, That nothing in this act [this section] shall in any manner impair or affect the supervisory and appellate powers and duties in regard to Indian affairs which may be vested in the Secretary of the Interior as trustee for various Indian tribes, except as to the custody of said bonds and the collection of interest thereon as hereinbefore mentioned."

25 U.S.C. §174

§174. Superintendence by President over tribes west of Mississippi

"The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May 28, 1830, 'to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi'; and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever."

25 U.S.C. §185

§185. Protection of Indians desiring civilized life

"Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him."

25 U.S.C. §331

§331. Allotments on reservations---Irrigable and nonirrigable lands

"In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him for nonirrigable agricultural or grazing lands: Provided furtner, That where a

treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified in this act, with the consent of the Indians expressed in such manner as the President in his discretion may require."

25 U.S.C. §348

§348. Patents to be held in trust--Descent and partition

"Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted

in severalty under the provisions of this act: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the Treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent,

shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office [Bureau of Land Management], and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying [on February 8, 1887], any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purpose heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satis-

fied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act."

25 U.S.C. §462

§462. Trust periods extended

"The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress."

25 U.S.C. §470

§470. Appropriation for revolving loan fund

"There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established."

25 U.S.C. §476

§476. Organization of tribes--Constitution and by-laws

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise

such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget [Office of Management and Budget] and the Congress."

25 U.S.C. §477

§477. Incorporation of tribes

"The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress."

28 U.S.C. §1491

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

Nothing herein shall be construed to give the Court of Claims jurisdiction of any civil action with the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended [16 USCS §§ 831 et seq.], with respect to suits by or against the Authority."

§1494. Accounts of officers, agents or contractors

"The Court of Claims shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent or contractor, and to render judgment thereof [thereon] where--

(1) claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

(2) three years have elapsed from the date of such application without settlement; and

(3) no suit upon the same has been brought by the United States."

28 U.S.C. §1505

§1505. Indian claims

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

IN THE UNITED STATES COURT OF CLAIMS

No. 328-77

OCT 16 1978

THE MONTANA BANK OF CIRCLE, N.A.,	)	Breach of contract; breach of fiduciary duty; mutual mistake; defective specifications; delay; assignment; agency authority; Indians
Plaintiff,	)	
vs.	)	
THE UNITED STATES,	)	
Defendant.	)	

Thomas E. Towe, attorney of record, for plaintiff. Towe, Ball & Enright, of counsel.

Peter A. T. Sartin, with whom was Assistant Attorney General Barbara Allen Babcock, for defendant.

Before FRIEDMAN, Chief Judge, KUNZIG and BENNETT, Judges.

O R D E R

This case comes before the court on defendant's motion for summary judgment. Plaintiff is a national banking corporation whose claims against the United States rest primarily on alleged acts and omissions of the Bureau of Indian Affairs (BIA) and the Department of Housing and Urban Development (HUD). Plaintiff's claims are asserted to have accrued to it directly and also to the Fort Belknap Indian Community[1/] and the Community's wholly owned corporation, Fort Belknap Builders (Builders), of which two entities plaintiff claims to be the assignee.

In the early 1970's, the Fort Belknap Indian Community embarked upon a program of economic development with the strong support of the BIA.[2/] The Indians

---

1/ The Fort Belknap Indian Community (or Fort Belknap Reservation) is comprised of the Gros Ventre and Assiniboine Indians.

2/ For purposes of this motion, we accept as true plaintiff's allegations of fact,

but not law, and treat the pleadings in the light most favorable to the plaintiff. See Aleut Community of St. Paul Island v. United States, 202 Ct. Cl. 182, 187, 480 F.2d 831, 833-34 (1973); United States v. Native Village of Unalakleet, 188 Ct. Cl. 1, 14, 411 F.2d 1255, 1261 (1969).

---

decided to construct a factory building and to enter into the home building business. The Tribal Council established a for-profit corporation, Builders, owned wholly by the tribe and incorporated under the laws of Montana. Management for Builders was to be provided by a separate, non-Indian corporation, Economic Consultants, Inc.

Financing for the factory project was obtained from plaintiff after negotiation involving the BIA and the Indians. Plaintiff lent the tribe $350,000. Of this sum, $150,000 was to be used for the industrial complex and $200,000 by Builders as working capital. Additional funds appear to have been supplied by the

BIA. By letter of intent dated February 2, 1970, the BIA agreed to rent 10,000 square feet of subdivided office space for $12,000 per annum. One of the agreement's conditions was that the lease was necessary to qualify Builders for a loan from the bank (plaintiff). The letter of intent was incorporated in the loan agreement between plaintiff and the tribe, and the proceeds of the lease were contemporaneously assigned to plaintiff. The entire transaction was submitted to BIA for review, and its approval was recorded on these documents. The building was completed, but the BIA never took possession, for reasons which are disputed.

The several loans made by plaintiff appear now to be in default, and plaintiff seeks to hold the Government liable, relying on several different legal theories. In general summary these

theories include breach of the BIA's asserted obligation to lease space (Count I), breach of fiduciary duty (Counts II and III), mutual mistake (Counts IV and VII), defective specifications (Counts V and VIII), and Government-caused delays (Counts VI and IX).

As to Count I of the petition, plaintiff argues, alternatively, that it has a contract with defendant, that it is the third-party beneficiary of a contract between Builders and defendant, and that it is the assignee of Builders' rights under Builders' contract with defendant. Defendant denies that plaintiff has any enforceable rights under the letter of intent and further argues that the letter's terms were never breached by defendant because the office space was never made available to it.

We cannot say that plaintiff is without a claim on Count I, for there are

factual issues requiring development. The mutual intent of the parties cannot be determined without further investigation, nor can the disputed issue of whether the agreement was breached be decided at this juncture since conflicting affidavits have been submitted. Count I of the petition must be and is remanded to the trial judge.

The two counts based on breach of fiduciary obligation present unique and factually complicated arguments involving several issues of first impression. Under 28 U.S.C. § 1505 (1970), this court has jurisdiction of --

> * * * any claim against the United States * * * in favor of any tribe, band, or other identifiable group of American Indians * * * whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President * * * .

Plaintiff relies on both a treaty and on several statutes to establish defendant's fiduciary obligations to the Fort Belknap

Indians, and defendant, in its answer, has admitted the existence of a trust relationship with the tribe. Such obligations exist only where imposed by treaty, statute, Executive order, or agreement. See Sac & Fox Tribe v. United States, 179 Ct. Cl. 8, 27, 383 F.2d 991, 1001, cert. denied, 389 U.S. 900 (1967). This of course leaves open such questions as what the basis of the trust relationship is, what its obligations included, whether such duties are owed to Builders as well as to the tribe, whether defendant's obligations were breached, whether any claim arising out of such a breach can be brought by a non-Indian (to whom the duty does not run directly) upon an assignment of the claim, and whether any such claim was in fact assigned to plaintiff here. We recognize that some of the issues just stated appear purely legal, yet we believe all of them should be re-

manded for first consideration by the trial judge. We cannot rush to decide important legal issues without knowing that such issues are ripe, yet here a factual defect in plaintiff's theory may make it unnecessary to grapple with the novel legal questions, which have not in any event been adequately briefed for our consideration at this time and which can be more confidently decided (if necessary) once the factual background has been illuminated more clearly. Counts II and III are therefore remanded to the trial judge.

Counts IV-IX of the petition arise out of transactions concerning two low-income housing projects known as the Montana 10-5 and the Montana 10-1 projects. Both projects were to be built for, and sold to, the Fort Belknap Indian Housing Authority (IHA), which had been created by the Tribal Council in 1963. The 10-5

project involved a construction contract awarded by IHA to C&M Construction Company, whose responsibilities as builder were transferred to Builders in 1970. The 10-1 contract was similar except that Builders bore construction responsibilities to the IHA right from the start. Appended to both contracts were Annual Contributions Contracts, between HUD and the IHA, by which HUD undertook to provide financing for the projects. Assignments by Builders to plaintiff of rights under the 10-1 and 10-5 contracts were executed in exchange for other financing provided by plaintiff.

Builders met with problems and failed to complete either contract. Builders appears to have been incompetently managed. The IHA ultimately arranged to have construction completed by another firm, Smith Enterprises, which also was financed by plaintiff.

Counts IV through IX clearly lack merit. These counts all involve contract claims based on the two housing project contracts between the Indian Housing Authority and Builders, and plaintiff relies on assignments to stand in the shoes of Builders. But Builders' contract is with the Housing Authority, not with the United States, and there is no basis in such circumstances for a suit against the United States. Housing Corp. of America v. United States, 199 Ct. Cl. 705, 468 F.2d 922 (1972). Plaintiff attempts to escape this precedent, and the cases which have followed, see order of July 8, 1977, Beco, Inc. v. United States, 214 Ct. Cl. 820, by arguing that the Government bears special responsibilities when the housing authority is created by Indians. But, nothing in the statute which authorizes HUD to assist in the development of low-income housing

projects, 42 U.S.C. §§ 1401 et seq. (1970), suggests that a housing authority established by Indians stands on a different footing than those created by others. Moreover, the special responsibilities owed to this group of Indians are exhausted by the claims stated in Counts II and III, and they cannot serve to convert the housing authority into defendant's agent as plaintiff would have us hold. Plaintiff must, but here cannot, prove the actual authority of those whom it seeks to hold as the Government's agents. Housing Corp. of America v. United States, supra; Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947). Plaintiff also asserts defendant failed to make payments required under the Annual Contributions Contracts; any such claim would have to be brought by the Indian Housing Authority (with whom the contracts were made by defendant), but

there are no indications here of any dispute between the Housing Authority and defendant and no allegation is made that plaintiff is the assignee of the Housing Authority.

IT IS THEREFORE ORDERED, upon consideration of the pleadings and briefs, but without oral argument, that defendant's motion for summary judgment is granted in part and denied in part. Counts I, II, and III of the petition are remanded to the trial judge for further proceedings, and Counts IV through IX are dismissed.

BY THE COURT

Daniel M. Friedman
Chief Judge

Office-Supreme Court, U.S.
FILED
JAN 28 1983
ALEXANDER L. STEVAS,

No. 82-785

In the Supreme Court of the United States

OCTOBER TERM, 1982

FORT BELKNAP INDIAN COMMUNITY, GROS VENTRE AND ASSINIBOINE TRIBES, A TRIBAL GOVERNMENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ROBERT L. KLARQUIST
BLAKE A. WATSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the former Court of Claims had jurisdiction to entertain a claim for money damages against the United States for alleged breach of the government's duty under 25 U.S.C. 81 to protect petitioner from entering into disadvantageous business agreements with third parties.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Eastport Steamship Corp. v. *United States*, 372 F.2d 1002 4

Hydaburg Cooperative Association v. *United States*, 667 F.2d 64, cert. denied, No. 81-6812 (Oct. 12, 1982) 6, 7

Inupiat Community of Arctic Slope v. *United States*, 680 F.2d 122, cert. denied, No. 82-359 (Nov. 1, 1982) 3, 8

Mitchell v. *United States*, 664 F.2d 265, cert. granted, No. 81-1748 (June 7, 1982) 3, 5, 6, 7, 8

Montana Bank of Circle, N.A. v. *United States*, No. 328-77 (Ct. Cl. Oct. 6, 1978) 5

United States v. *King*, 395 U.S. 1 5

United States v. *Mitchell*, 445 U.S. 535 ..... 2, 3, 4, 5, 6, 7, 8

United States v. *Testan*, 424 U.S. 392 ..... 2, 4

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 6

Page

Statutes:

General Allotment Act, 25 U.S.C. 331-358 4

Indian Claims Commission Act, 28 U.S.C. 1505 ..... 4, 8

Tucker Act, 28 U.S.C. (Supp. V) 1491 ..... 4, 7, 8

25 U.S.C. 81 ..... 3, 5, 6, 7

25 U.S.C. 318a 5

25 U.S.C. 323-325 5

25 U.S.C. 406-407 5

25 U.S.C. 466 5

25 U.S.C. 470 7

25 U.S.C. 476 1

Miscellaneous:

H.R. Rep. No. 2449, 85th Cong., 2d Sess. (1958) 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-785

FORT BELKNAP INDIAN COMMUNITY, GROS VENTRE AND ASSIBOINE TRIBES, A TRIBAL GOVERNMENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the former Court of Claims (Pet. App. A-2 to A-10) is unreported.

JURISDICTION

The judgment of the former Court of Claims was entered on August 6, 1982 (Pet. App. A-2). The petition for a writ of certiorari was filed on November 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. Petitioner is comprised of the Gros Ventre and Assiniboine Tribes and is organized pursuant to the Indian Reorganization Act. 25 U.S.C. 476. In the early 1970's petitioner undertook several construction projects through its wholly owned subsidiary, Fort Belknap Builders. A loan of $350,000 was obtained by petitioner in April 1970, from the Montana Bank of Circle, N.A., after the Bureau of Indian

Affairs (BIA) agreed to lease office space in one of the petitioner's buildings. The construction projects, however, were largely unsuccessful, and petitioner defaulted on its loan obligations.

2. On August 14, 1981, petitioner filed the present action in the Court of Claims, alleging that the United States breached its lease agreement and violated various fiduciary duties owed to petitioner. With regard to the latter claims, petitioner alleges that a trust relationship exists between the United States and petitioner and that petitioner may recover money damages for breach of the government's fiduciary obligations pursuant to the trust relationship.[1]

3. The Court of Claims granted the government's motion to dismiss all of the petitioner's claims for breach of fiduciary duty on the ground that petitioner failed to state a claim within the jurisdiction of the Court. Pet. App. A-5.[2] Relying on this Court's decisions in *United States* v. *Testan*, 424 U.S. 392 (1976), and *United States* v. *Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), the Court of Claims held that it lacked jurisdiction over claims for breach of fiduciary duty in the absence of a waiver of sovereign immunity

---

[1]In particular, petitioner claims that the United States breached its fiduciary duty by 1) failing to investigate the persons contracted by petitioner to manage the construction projects, 2) failing adequately to assist petitioner with its financial negotiations, 3) failing to inform petitioner and take appropriate action after discovering the mismanagement and jeopardy of the construction projects, 4) failing properly to supervise and evaluate the construction projects, 5) failing to make required contract payments, and 6) drafting contract specifications impossible of performance (Pet. 11-13).

[2]The Court of Claims denied the government's motion to dismiss with regard to the claim for breach of the office lease and remanded the claim to the trial division for further proceedings. Pet. App. A-4 to A-5, A-10.

evidenced in a statute or regulation mandating compensation by the government for damages sustained. Pet. App. A-5 to A-10. The Court of Claims rejected petitioner's reliance on 25 U.S.C. 81, which requires government approval of Indian contracts with third persons,[3] holding that the statute, although "designed to protect Indians by subjecting their contracts with third persons to * * * prior examination and approval * * *," nevertheless fell short "of the 'clear or strong' [*Inupiat Community of Arctic Slope* v. *United States*, 680 F.2d 122, 130 (Ct. Cl.), cert. denied, No. 82-359 (Nov. 1, 1982)] Congressional intent required to create a fiduciary duty by the United States to oversee and manage a tribe's contractual relations, for the breach of which the United States must respond in damages" (Pet. App. A-8 to A-9).

ARGUMENT

The decision of the Court of Claims represents the application of settled law to the facts of this case, and does not conflict with any decision of this Court or any court of appeals.[4] Accordingly, further review by this Court is not warranted.

---

[3] 25 U.S.C. 81 provides in part that "[n]o agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money * * * unless such contract or agreement * * * shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

[4] In reaching its result, the Court of Claims was guided by its own decision in *Mitchell* v. *United States*, 664 F.2d 265 (Ct. Cl. 1981), cert. granted, No. 81-1748 (June 7, 1982) ("*Mitchell II*"), as well as by *Mitchell I*. The United States sought certiorari in *Mitchell II* because the Court of Claims employed an improperly lax standard in determining that the statutes there involved authorized recovery of damages against the United States. There is no need to defer disposition of the present case pending the final disposition of *Mitchell II*, however, because the decision below rests upon, and is consistent with the Court of Claims' decision in *Mitchell II*.

1. Petitioner's chief argument concerns the circumstances necessary for an Act of Congress to give rise to a claim for damages under the Tucker Act, 28 U.S.C. (Supp. V) 1491.[5] In *United States* v. *Testan, supra*, this Court held that a federal statute creates a substantive right to money damages, necessary for jurisdiction, only if it " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " 424 U.S. at 400 (quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). In *Mitchell I, supra*, 445 U.S. at 538-539, this Court made clear that the jurisdictional requirements enunciated in *Testan* apply equally to Indian claims under 28 U.S.C. (Supp. V) 1491, and similarly that, in an action on behalf of a Tribe brought pursuant to 28 U.S.C. 1505, there must likewise be a waiver of sovereign immunity, which cannot be implied but must be unequivocally expressed. In the absence of such a clear congressional consent, the Court of Claims has no jurisdiction to entertain a suit against the United States. The Court found that Congress, in passing the General Allotment Act, 25 U.S.C. 331-358, created only a limited trust relationship and did not impose any fiduciary duty on the government for the management of timber resources. 445 U.S. at 542.

Petitioner contends (Pet. 24-25) that the requirement of *Mitchell I* that a federal statute, in order to constitute a waiver of sovereign immunity, must at least "unambiguously provide that the United States has undertaken full

---

[5]The Tucker Act provides in pertinent part that

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. • • •

fiduciary responsibilities," 445 U.S. at 542, is "at odds" with the "plain meaning" canon of construction and the rule that statutes intended to benefit Indians are to be liberally construed in the Indians' favor. This contention is meritless. It is without question that a waiver of immunity " 'cannot be implied but must be unequivocally expressed,' " *Mitchell I, supra*, 445 U.S. at 538 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)), and, under these circumstances, the canons of construction referred to by petitioner clearly cannot overcome the conclusion of the Court of Claims that 25 U.S.C. 81 does not impose fiduciary duties upon the government the breach of which mandates compensation and thus provides a basis for jurisdiction.[6]

Petitioner additionally argues (Pet. 29, 35-36) that the Court of Claims failed properly to apply the analysis set forth in its own decision in *Mitchell* v. *United States*, 664 F.2d 265 (Ct. Cl. 1981), cert. granted, No. 81-1748 (June 7, 1982) ("*Mitchell II*").[7] In *Mitchell II* the Court of Claims held that certain statutes,[8] other than the General Allotment Act, which concern the federal management of Indian forests and lands, created fiduciary obligations under

---

[6]The fact that the government admitted to the existence of a general trust relationship with petitioner (Pet. 33) in a related case, *Montana Bank of Circle, N.A.* v. *United States*, No. 328-77 (Ct. Cl. Oct. 6, 1978), does not bear upon the issue of whether a breach of a fiduciary duty owed under 25 U.S.C. 81 mandates compensation and is within the jurisdiction of the Court of Claims.

[7]As previously noted, it is the position of the United States that the Court of Claims' *Mitchell II* decision employs an erroneous standard for determining whether a federal statute grounds a claim for damages against the United States. If we are right in that submission any "error" in the instant case favored petitioner.

[8]The statutes involved were 25 U.S.C. 406-407; 25 U.S.C. 466; and 25 U.S.C. 318a, 323-325.

which claims for money damages for breach may be brought. The court summarized its analysis as follows:

> The common thread of the statutes we have just construed as contemplating compensation to the Indians is that they all (a) deal with Indian-owned property, (b) directed to be managed or controlled by federal officials as fiduciaries, (c) in the express interest of and for the benefit of the Indians, and (d) from which Congress clearly wanted the Indians to obtain the financial benefits.

644 F.2d at 273. Even under this expansive view of the availability of a cause of action for damages against the United States for alleged statutory violations, petitioner's claim for damages founded on 25 U.S.C. 81 clearly must fail.

It is manifest that 25 U.S.C. 81 does not direct federal officials to manage or control Indian-owned property. As the Court of Claims indicated (Pet. App. A-8), the statute does not place the United States in a position of overseeing and managing every aspect of tribal contractual relations. By contrast, in *Mitchell II* the Court of Claims found that the management and control of the government over Indian forest land was "comprehensive" and involved "day-to-day" supervision by the Bureau of Indian Affairs." 664 F.2d at 269 (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145 (1980)).[9] In addition, in *Mitchell II* the court stressed that the statutes involved were enacted for the specific purpose of assuring that the forests be

---

[9]The relevance of pervasive federal management and control is also reflected in this Court's decision in *Mitchell I*. There the Court concluded that the General Allotment Act created only a limited trust relationship, noting that under that statute the Indian allottee, and not the government, was responsible for managing the land. 445 U.S. at 542-543. See also *Hydaburg Cooperative Association* v. *United States*, 667 F.2d 64, 68-69 (Ct. Cl. 1981), cert. denied, No. 81-6812 (Oct. 12, 1982).

managed so as to continually obtain the maximum revenue obtainable for the Indians consistent with proper maintenance of the forests. 664 F. 2d 271-273. The intent of Congress in passing 25 U.S.C. 81, however, was "to protect Indians by subjecting their contracts with third persons to the prior examination and approval of the Secretary of the Interior and the Commissioner of Indian Affairs" (Pet. App. A-8, citing H.R. Rep. No. 2449, 85th Cong., 2d Sess. 1 (1958)). Congress did not intend to thrust the Bureau of Indian Affairs into a comprehensive, day-to-day supervisory role under 25 U.S.C. 81.[10]

The Court of Claims' decision does not conflict with this Court's decision in *Mitchell I*, nor does it conflict with the analysis set forth in *Mitchell II*. Even under the *Mitchell II* analysis, it is clear that 25 U.S.C. 81 cannot be fairly interpreted as mandating money compensation for breaches of fiduciary obligations so as to constitute a waiver of sovereign immunity.

2. Petitioner also argues (Pet. 19-22, 38-40) that the language in the Tucker Act granting jurisdiction to the Court of Claims over claims "for liquidated or unliquidated damages in cases not sounding in tort * * *," 28 U.S.C. (Supp. V) 1491, constitutes a waiver of sovereign immunity. This argument, however, was not addressed to the Court of

---

[10]In *Hydaburg Cooperative Association* v. *United States*, 667 F.2d 64 (Ct. Cl. 1981), cert. denied, No. 81-6812 (Oct. 12, 1982), the Court of Claims invoked similar reasoning to find that 25 U.S.C. 470, which establishes a revolving loan fund "for the purpose of promoting the economic development of [chartered Indian] tribes," does not impose a fiduciary duty on the United States "to promote the commercial success of borrowing Indians." 667 F. 2d at 68. Additionally, the court held that 25 U.S.C. 470 did not impose a duty to ensure that "assets and enterprises acquired by the Indians pursuant to the [Indian Reorganization] Act will continue to operate." 667 F. 2d at 68.

Claims by petitioner and consequently should not be considered by this Court. See *Mitchell I, supra*, 445 U.S. at 546 n.7.[11] In any event, this Court clearly held in *Mitchell I* that individual Indian and tribal claimants must look beyond jurisdictional statutes such as the Tucker Act and the Indian Claims Commission Act, 28 U.S.C. 1505, for a right of action in damages against the United States. 445 U.S. at 538-539. Likewise, in *Inupiat Community of Arctic Slope v. United States*, 680 F.2d 122, 132 (Ct. Cl.), cert. denied, No. 82-359 (Nov. 1, 1982), the Court of Claims held that the language in question does not provide a basis for jurisdiction "unless there also is a statute or a valid regulation mandating the payment of money."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ROBERT L. KLARQUIST
BLAKE A. WATSON
Attorneys

JANUARY 1983

---

[11]The Court of Claims in *Mitchell II* also declined to address the effect of the language in 28 U.S.C. (Supp. V) 1491, giving jurisdiction over claims against the United States for "liquidated or unliquidated damages in cases not sounding in tort," noting that the plaintiffs, like the petitioner in the instant case, chose not to rely on that clause but rather on specific legislation as founding their claims. *Mitchell II, supra*, 664 F. 2d at 270 n.7.